

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMY LEDESMMA,) No. EDCV 08-1135-RC
)
 Plaintiff,)) OPINION AND ORDER
)
 v.))
)
 MICHAEL J. ASTRUE,))
 Commissioner of Social Security,))
)
 Defendant.))
 _____)

Plaintiff Amy Ledesma filed a complaint on September 3, 2008, seeking review of the Commissioner's decision denying her application for disability benefits. On February 17, 2009, the Commissioner answered the complaint, and the parties filed a joint stipulation on April 15, 2009.

BACKGROUND

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26 On August 25, 2006 (protective filing date), plaintiff applied
27 for disability benefits under Title II of the Social Security Act
28 ("Act"), 42 U.S.C. § 423, and the Supplemental Security Income program

1 of Title XVI of the Act, 42 U.S.C. § 1382(a), claiming an inability to
2 work since March 3, 2006, due to bipolar disorder. Certified
3 Administrative Record ("A.R.") 8, 90. The plaintiff's application was
4 initially denied on February 20, 2007, and, following reconsideration,
5 was denied again on August 20, 2007. A.R. 8. The plaintiff then
6 requested an administrative hearing, which was held on March 6, 2008,
7 before Administrative Law Judge Mason D. Harrell, Jr. ("the ALJ").
8 A.R. 16-44. On April 4, 2008, the ALJ issued a decision finding
9 plaintiff is not disabled. A.R. 6-15. The plaintiff appealed this
10 decision to the Appeals Council, which denied review on July 3, 2008.
11 A.R. 1-3.

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II

14 The plaintiff, who was born on July 22, 1968, is currently 41
15 years old. A.R. 14, 99, 122. She has a 12th-grade education with one
16 year of business college, and previously worked as a receptionist and
17 as a waitress. A.R. 26, 91, 93, 120.

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19 Plaintiff was treated at the Riverside County Department of
20 Mental Health ("RCDMH") from February 1, 2006, to February 13, 2008.
21 A.R. 150-208, 233-38. Her primary treating physician was Bruce
22 Bogost, M.D.,¹ A.R. 150-51, 154, 178, 182, 185, 188, 196, 203, 206-07,

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24 ¹ Dr. Bogost was a treating physician, although plaintiff
25 refers to him as a "consultative examiner." Jt. Stip. at 12:12-
26 13. See, e.g., Le v. Astrue, 529 F.3d 1200, 1201-02 (9th Cir.
27 2008) (physician who saw claimant five times in three years for
treatment was treating physician); Ghokassian v. Shalala, 41 F.3d
1300, 1303 (9th Cir. 1994) (physician who saw claimant twice
within 14 months and prescribed medication was treating
physician).

1 who diagnosed plaintiff as having bipolar II disorder and
 2 polysubstance dependence. See A.R. 150-51, 182, 196. Dr. Bogost and
 3 others prescribed several medications to plaintiff, including Zoloft,²
 4 Depakote,³ and Seroquel.⁴ A.R. 150-51, 153, 178, 203, 206, 236. On
 5 September 28, 2006, Dr. Bogost opined plaintiff: was paranoid and
 6 suffered from delusions; had a "mild" impairment of her memory and
 7 judgment; showed evidence of insomnia, depression and anxiety; was
 8 unable to maintain a sustained level of concentration, perform
 9 repetitive tasks for an extended period, or adapt to new or stressful
 10 situations; could not interact appropriately with strangers, co-
 11 workers or supervisors; was fearful and anxious; and needed assistance
 12 in keeping appointments. A.R. 151. Dr. Bogost further opined
 13 plaintiff could not complete a 40-hour work week without decompensat-
 14 ing, and her prognosis was guarded. Id.

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16 On September 4, 2006, Eugene Hu, M.D., an attending physician at
 17 Riverside County Regional Medical Center, noted plaintiff appeared to
 18 be using cocaine, amphetamine and heroin, and cleared plaintiff for
 19 entry into a "detox" program. A.R. 122-23. J. Robinson, L.V.N.,

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21 ² Zoloft, also called Sertraline, "is prescribed for major
 22 depression – a persistently low mood that interferes with
 23 everyday living." The PDR Family Guide to Prescription Drugs at
 612, 763 (8th ed. 2000).

24 ³ Among other uses, "Depakote . . . [is] used to control
 25 the manic episodes – periods of abnormally high spirits and
 26 energy – that occur in bipolar disorder (manic depression)." Id.
 27 at 194.

28 ⁴ "Seroquel combats the symptoms of schizophrenia, a mental
 29 disorder marked by delusions, hallucinations, disrupted thinking,
 30 and loss of contact with reality." Id. at 610.

1 noted plaintiff was on Methadone, was "shaky," and admitted using
 2 heroin the day before and showed "numerous scarred tract & prior
 3 abscess looking sites on [her] body." A.R. 124, 126.

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5 On February 10, 2007, psychiatrist Romualdo R. Rodriguez, M.D.,
 6 examined plaintiff, A.R. 127-35, and noted she was not under the
 7 influence of drugs at the time. A.R. 130. Dr. Rodriguez found
 8 plaintiff: had "coherent and organized" thought processes and was not
 9 delusional; had "no current suicidal, homicidal or paranoid ideation";
 10 described "her mood as euthymic"; was "polite, serious and relaxed"
 11 and not "tearful"; although feeling "helplessness and hopelessness at
 12 times, [plaintiff does] not [feel] worthless and guilty"; was "alert
 13 and oriented . . . [and] appears to be of at least average
 14 intelligence"; "could recall three items immediately and two items
 15 after five minutes"; "could perform serial threes [and] . . . can
 16 correctly and quickly complete simple mathematic problems"; and "was
 17 able to follow . . . conversation well." A.R. 130-31. Nevertheless,
 18 Dr. Rodriguez found plaintiff's "[i]nsight into her problems is very
 19 problematic," and determined plaintiff was "still actively using drugs
 20 illegally and not getting proper care for her mental health issues."
 21 A.R. 132. Dr. Rodriguez diagnosed plaintiff with: post-traumatic
 22 stress disorder, attention deficit hyperactivity disorder (ADHD) and
 23 polysubstance dependence, and he determined her Global Assessment of
 24 Functioning (GAF) was 60.⁵ Id. Dr. Rodriguez opined that, "if

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26 ⁵ A GAF of 60 indicates "[m]oderate symptoms (e.g., flat
 27 affect and circumstantial speech, occasional panic attacks) or
 28 moderate difficulty in social, occupational, or school
 functioning (e.g., few friends, conflicts with peers or
 coworkers)." American Psychiatric Association, Diagnostic and

1 [plaintiff] stopped all illegal drugs and [was] properly treated for
 2 ADHD and/or any other mood disorders she may have, she could easily
 3 recover from her problems within twelve months." A.R. 133. Dr.
 4 Rodriguez found plaintiff was: (1) "[a]ble to understand, remember
 5 and carry out simple one or two step job instructions"; (2) "[a]ble to
 6 do detailed and complex instructions"; (3) "[s]lightly limited in her
 7 ability to relate and interact with supervisors, coworkers and the
 8 public"; (4) "[m]oderately limited in her ability to maintain
 9 concentration and attention, persistence and pace"; (5) "[s]lightly
 10 limited in her ability to associate with day-to-day work activity,
 11 including attendance and safety"; (6) "[s]lightly limited in her
 12 ability to adapt to the stresses common to a normal work environment";
 13 (7) "[s]lightly limited in her ability to maintain regular attendance
 14 in the work place and perform work activities on a consistent basis";
 15 and (8) "[s]lightly limited in her ability to perform work activities
 16 without special or additional supervision." A.R. 133-34.

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18 On February 15, 2007, nonexamining psychiatrist Barbara A. Smith,
 19 M.D., opined plaintiff suffers from an affective disorder and a
 20 polysubstance dependence, and determined plaintiff's impairments were
 21 not severe. A.R. 136-46. Dr. Smith opined plaintiff has: (1) "mild"
 22 restriction of activities of daily living; (2) "marked" difficulties
 23 in maintaining social functioning; (3) "marked" difficulties in
 24 maintaining concentration, persistence or pace; and (4) three episodes
 25 of decompensation, each of extended duration. A.R. 144. Dr. Smith
 26 found plaintiff's drug abuse and alcoholism were material and without

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 28 Statistical Manual of Mental Disorders, 34 (4th ed. (Text
 Revision) 2000).

1 those conditions, plaintiff's "impairment [would] not [be] severe[,]"
2 and plaintiff would have no restriction in activities of daily living,
3 no difficulties in maintaining social functioning, "mild" difficulties
4 in maintaining concentration, persistence or pace, and no episodes of
5 decompensation. A.R. 144, 146.

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7 On May 3, 2007, Dr. Bogost, who had not seen plaintiff since
8 December 7, 2006, opined plaintiff: showed no signs of psychosis and
9 her memory was intact; had mildly impaired judgment; showed evidence
10 of confusion, depression and anxiety and showed negative symptoms for
11 apathy; could maintain a sustained level of concentration, but could
12 not adapt to new or stressful situations; could not interact
13 appropriately with family, strangers, co-workers or supervisors; was
14 hostile, fearful and anxious; and needed assistance in keeping
15 appointments. A.R. 150. Dr. Bogost again opined plaintiff could not
16 complete a 40-hour work week without decompensating, and that her
17 prognosis was guarded. Id.

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19 On February 13, 2008, an unidentified physician at RCDMH
20 diagnosed plaintiff as having an unspecified mood disorder and heroin
21 and methamphetamine dependence. A.R. 238. He/she opined that
22 plaintiff: showed evidence of insomnia, depression, anxiety and
23 compulsive behaviors, as well as impaired judgment and concrete
24 thought patterns; showed no ability to maintain a sustained level of
25 concentration, sustain repetitive tasks for an extended period, or
26 adapt to new or stressful situations; showed no ability to interact
27 appropriately with family, strangers, co-workers or supervisors;
28 needed assistance with hygiene, and was unable to manage funds in her

1 best interest; "missed her appointments and has refused to go for lab
2 work," and her prognosis was "chronic." Id.

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4 Medical expert Joseph M. Malancharuvil, Ph.D., testified at the
5 administrative hearing that plaintiff has a mixed substance abuse
6 disorder, an organic affective disorder with bipolar features
7 secondary to substance abuse, and a personality disorder, not
8 otherwise specified. A.R. 26-36. Dr. Malancharuvil opined that her
9 mental limitations would be "marked" if she's intoxicated, but, if not
10 abusing drugs, she would have only a "mild" limitation in her
11 activities of daily living, "mild" difficulty maintaining social
12 functioning, "mild-to-moderate" difficulties maintaining
13 concentration, persistence or pace, and no episodes of decompensation.
14 A.R. 28-29. Dr. Malancharuvil further opined plaintiff is restricted
15 to simple work, up to four to five-step instructions with no excessive
16 speed requirements, and she should not be involved in safety
17 operations or operate hazardous machinery. A.R. 29-31.

18

19 DISCUSSION

20

21 This Court, pursuant to 42 U.S.C. § 405(g), has the authority to
22 review the Commissioner's decision denying plaintiff disability
23 benefits to determine if his findings are supported by substantial
24 evidence and whether the Commissioner used the proper legal standards
25 in reaching his decision. Vasquez v. Astrue, 572 F.3d 586, 591 (9th
26 Cir. 2009); Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009).
27 "In determining whether the Commissioner's findings are supported by
28 substantial evidence, [this Court] must review the administrative

1 record as a whole, weighing both the evidence that supports and the
 2 evidence that detracts from the Commissioner's conclusion." Reddick
 3 v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Lingenfelter v. Astrue,
 4 504 F.3d 1028, 1035 (9th Cir. 2007); Holohan v. Massanari, 246 F.3d
 5 1195, 1201 (9th Cir. 2001). "Where the evidence can reasonably
 6 support either affirming or reversing the decision, [this Court] may
 7 not substitute [its] judgment for that of the Commissioner." Ryan v.
 8 Comm'r of Soc. Sec., 528 F.3d 1194, 1205 (9th Cir. 2008) (quoting
 9 Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007), cert. denied, 128
 10 S. Ct. 1068 (2008)); Vasquez, 572 F.3d at 591.

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12 The claimant is "disabled" for the purpose of receiving benefits
 13 under the Act if she is unable to engage in any substantial gainful
 14 activity due to an impairment which has lasted, or is expected to
 15 last, for a continuous period of at least twelve months. 42 U.S.C.
 16 §§ 423(d)(1)(A), 1382c(a)(3)(A); 20 C.F.R. §§ 404.1505(a), 416.905(a).
 17 "The claimant bears the burden of establishing a prima facie case of
 18 disability." Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir. 1995),
 19 cert. denied, 517 U.S. 1122 (1996); Smolen v. Chater, 80 F.3d 1273,
 20 1289 (9th Cir. 1996); see also Valentine v. Comm'r Soc. Sec. Admin.,
 21 574 F.3d 685, 689 (9th Cir. 2009) ("To establish eligibility for
 22 Social Security benefits, a claimant has the burden to prove he is
 23 disabled.").

24

25 The Commissioner has promulgated regulations establishing a
 26 five-step sequential evaluation process for the ALJ to follow in a
 27 disability case. 20 C.F.R. §§ 404.1520, 416.920. In the **First Step**,
 28 the ALJ must determine whether the claimant is currently engaged in

1 substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b).
 2 If not, in the **Second Step**, the ALJ must determine whether the
 3 claimant has a severe impairment or combination of impairments
 4 significantly limiting her from performing basic work activities. 20
 5 C.F.R. §§ 404.1520(c), 416.920(c). If so, in the **Third Step**, the ALJ
 6 must determine whether the claimant has an impairment or combination
 7 of impairments that meets or equals the requirements of the Listing of
 8 Impairments ("Listing"), 20 C.F.R. § 404, Subpart P, App. 1. 20
 9 C.F.R. §§ 404.1520(d), 416.920(d). If not, in the **Fourth Step**, the
 10 ALJ must determine whether the claimant has sufficient residual
 11 functional capacity despite the impairment or various limitations to
 12 perform her past work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If not,
 13 in **Step Five**, the burden shifts to the Commissioner to show the
 14 claimant can perform other work that exists in significant numbers in
 15 the national economy. 20 C.F.R. §§ 404.1520(g), 416.920(g).
 16 Moreover, where there is evidence of a mental impairment that may
 17 prevent a claimant from working, the Commissioner has supplemented the
 18 five-step sequential evaluation process with additional regulations
 19 addressing mental impairments.⁶ Maier v. Comm'r of the Soc. Sec.

20 ⁶ First, the ALJ must determine the presence or absence of
 21 certain medical findings relevant to the ability to work. 20
 22 C.F.R. §§ 404.1520a(b)(1), 416.920a(b)(1). Second, when the
 23 claimant establishes these medical findings, the ALJ must rate
 24 the degree of functional loss resulting from the impairment by
 25 considering four areas of function: (a) activities of daily
 26 living; (b) social functioning; (c) concentration, persistence,
 27 or pace; and (d) episodes of decompensation. 20 C.F.R. §§
 28 404.1520a(c)(2-4), 416.920a(c)(2-4). Third, after rating the
 degree of loss, the ALJ must determine whether the claimant has a
 severe mental impairment. 20 C.F.R. §§ 404.1520a(d),
 416.920a(d). Fourth, when a mental impairment is found to be
 severe, the ALJ must determine if it meets or equals a Listing.
 20 C.F.R. §§ 404.1520a(d)(2), 416.920a(d)(2). Finally, if a

1 Admin., 154 F.3d 913, 914-15 (9th Cir. 1998) (per curiam).

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 3 However, “[a] finding of ‘disabled’ under the five-step inquiry
 4 does not automatically qualify a claimant for disability benefits.”
 5 Bustamante v. Massanari, 262 F.3d 949, 954 (9th Cir. 2001); Parra, 481
 6 F.3d at 746. Rather, the Act provides that “[a]n individual shall not
 7 be considered disabled . . . if alcoholism or drug addiction would
 8 . . . be a contributing factor material to the Commissioner’s
 9 determination that the individual is disabled.” 42 U.S.C. §
 10 423(d)(2)(C).

11
 12 For claimants such as plaintiff, who have substance abuse
 13 dependency, the ALJ “must first conduct the five-step inquiry without
 14 separating out the impact of alcoholism or drug addiction. If the ALJ
 15 finds that the claimant is not disabled under the five-step inquiry,
 16 then the claimant is not entitled to benefits and there is no need to
 17 proceed with the analysis under 20 C.F.R. §§ 404.1535 or 416.935.”
 18 Bustamante, 262 F.3d at 955 (citations omitted); see also Brueggemann
 19 v. Barnhart, 348 F.3d 689, 694 (8th Cir. 2003) (“The plain text of the
 20 relevant regulation requires the ALJ first to determine whether [the
 21 claimant] is disabled . . . without segregating out any effects that
 22 might be due to substance use disorders. . . .” (citations and
 23 footnote omitted)); Drapeau v. Massanari, 255 F.3d 1211, 1214 (10th

24
 25 Listing is not met, the ALJ must then perform a residual
 26 functional capacity assessment, and the ALJ’s decision “must
 27 incorporate the pertinent findings and conclusions” regarding
 28 plaintiff’s mental impairment, including “a specific finding as
 to the degree of limitation in each of the functional areas
 described in [§§ 404.1520a(c)(3), 416.920a(c)(3)].” 20 C.F.R. §§
 404.1520a(d)(3), (e)(2), 416.920a(d)(3), (e)(2).

1 Cir. 2001) ("The implementing regulations make clear that a finding of
 2 disability is a condition precedent to an application of §
 3 423(d)(2)(C). The [ALJ] must first make a determination that the
 4 claimant is disabled." (citation omitted)). Then the ALJ "must
 5 determine whether [the claimant's] drug addiction or alcoholism is a
 6 contributing factor material to the determination of disability."⁷ 20
 7 C.F.R. §§ 404.1535(a), 416.935(a); see also Brueggemann, 348 F.3d at
 8 694-95 ("If the gross total of a claimant's limitations, including the
 9 effect of substance use disorders, suffices to show disability, then
 10 the ALJ must next consider which limitations would remain when the
 11 effects of the substance use disorders are absent."); Drapeau, 255
 12 F.3d at 1214 ("[The ALJ] must then make a determination whether the
 13 claimant would still be found disabled if he or she stopped abusing
 14 alcohol [or drugs].").

15
 16 Applying the sequential evaluation process, the ALJ found
 17 plaintiff has not engaged in substantial gainful activity since the
 18 alleged onset of disability. (Step One). The ALJ then found
 19 plaintiff has the following "severe combinations of impairments:
 20 mixed substance addiction disorder, substance induced organic
 21 affective disorder with bipolar features, generalized anxiety
 22 disorder, and personality disorder, not otherwise specified"; however,
 23 plaintiff does not have a severe physical impairment. (Step Two).
 24

25 ⁷ "The 'key factor . . . in determining whether drug
 26 addiction or alcoholism is a contributing factor material to the
 27 determination of disability' is whether an individual would still
 28 be found disabled if [he] stopped using alcohol or drugs." Sousa
v. Callahan, 143 F.3d 1240, 1245 (9th Cir. 1998) (citation
 omitted); 20 C.F.R. §§ 404.1535(b)(1), 416.935(b)(1).

1 The ALJ then found plaintiff's "impairments, including the substance
 2 use disorders," meet the requirements of Listing nos. 12.02, 12.06,
 3 12.08 and 12.09. (Step Three). Having concluded plaintiff is
 4 disabled when her substance abuse is considered, the ALJ next
 5 addressed whether plaintiff's substance abuse is a contributing factor
 6 material to the disability determination. The ALJ found that if
 7 plaintiff stopped her substance abuse, she would continue to have a
 8 severe impairment or combination of impairments (Step Two); however,
 9 she would not have an impairment or combination of impairments that
 10 meets or equals a listed impairment. (Step Three). The ALJ then
 11 concluded that even if plaintiff stopped her substance abuse, she
 12 would be unable to perform her past relevant work. (Step Four).
 13 Finally, the ALJ determined that if plaintiff stopped her substance
 14 abuse, there are a significant number of jobs in the national economy
 15 she can perform; therefore, she is not disabled. (Step Five).

16

17

IV

18 A claimant's residual functional capacity ("RFC") is what she can
 19 still do despite her physical, mental, nonexertional, and other
 20 limitations. Mayes v. Massanari, 276 F.3d 453, 460 (9th Cir. 2001);
 21 see also Valentine, 574 F.3d at 689 (The RFC is "a summary of what the
 22 claimant is capable of doing (for example, how much weight he can
 23 lift)"). Here, the ALJ found that if plaintiff "stopped the
 24 substance use," she would retain the following RFC:

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26 to perform light work⁸ . . . except work involving more than

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28 ⁸ "Light work involves lifting no more than 20 pounds at a
 time with frequent lifting or carrying of objects weighing up to

1 simple tasks, i.e., more than four to five steps of instructions,
2 any rapid, assembly-line-type work, any significant
3 responsibility for the safety of others, or any significant
4 hypervigilance.

5
6 A.R. 12 (footnote added). However, plaintiff contends the RFC finding
7 is not supported by substantial evidence because: (1) the ALJ failed
8 to properly consider the opinions of treating physician Dr. Bogost and
9 consulting physician Dr. Rodriguez; (2) erroneously concluded
10 plaintiff is not a credible witness; and (3) failed to fully and
11 fairly develop the record. There is no merit to these contentions.

12
13 **A. Physicians' Opinion Evidence:**

14 The medical opinions of treating physicians are entitled to
15 special weight because the treating physician "is employed to cure and
16 has a greater opportunity to know and observe the patient as an
17 individual." Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987);
18 Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir.
19 1999). Therefore, the ALJ must provide clear and convincing reasons
20 for rejecting the uncontroverted opinions of a treating physician,
21 Ryan, 528 F.3d at 1198, and "[e]ven if [a] treating doctor's opinion
22 is contradicted by another doctor, the ALJ may not reject this opinion
23 without providing 'specific and legitimate reasons' supported by

24
25 10 pounds. Even though the weight lifted may be very little, a
26 job is in this category when it requires a good deal of walking
27 or standing, or when it involves sitting most of the time with
28 some pushing and pulling of arm or leg controls. To be
considered capable of performing a full or wide range of light
work, you must have the ability to do substantially all of these
activities." 20 C.F.R. §§ 404.1567(b), 416.967(b).

1 substantial evidence in the record." Reddick, 157 F.3d at 725;
2 Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008). Similarly,
3 the ALJ "must provide 'clear and convincing' reasons for rejecting the
4 uncontradicted opinion of an examining physician[,]" Lester v. Chater,
5 81 F.3d 821, 830 (9th Cir. 1995); Widmark v. Barnhart, 454 F.3d 1063,
6 1066 (9th Cir. 2006), and "[e]ven if contradicted by another doctor,
7 the opinion of an examining doctor can be rejected only for specific
8 and legitimate reasons that are supported by substantial evidence in
9 the record." Regennitter v. Comm'r of the Soc. Sec. Admin., 166 F.3d
10 1294, 1298-99 (9th Cir. 1999); Ryan, 528 F.3d at 1198.

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12 **B. Dr. Bogost:**

13 Dr. Bogost diagnosed plaintiff with bipolar II disorder and
14 polysubstance dependence and made various findings regarding
15 plaintiff's mental condition in two written reports dated
16 September 28, 2006, and May 3, 2007. The plaintiff contends the ALJ
17 improperly rejected Dr. Bogost's opinion in concluding plaintiff would
18 not be disabled if she stopped her substance abuse. The plaintiff is
19 mistaken.

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21 Dr. Bogost found plaintiff could not work given her bipolar
22 disorder and polysubstance abuse. A.R. 150-51. The ALJ agreed with
23 this conclusion, finding plaintiff is disabled when she is abusing
24 drugs. A.R. 11. However, as the ALJ noted, Dr. Bogost did not
25 consider, or have any opinion about, what mental limitations plaintiff
26 would have if she stopped abusing drugs,⁹ stating:

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28 ⁹ The record indicates plaintiff was abusing drugs
throughout her treatment at RCDMH. See, e.g., A.R. 158, 163,

1 The fact that [Dr. Bogost] . . . has indicated the
2 [plaintiff] cannot perform any work because of a combination
3 of affective, substance dependence, and personality
4 disorders is not material at this point in the sequential
5 evaluation process since it does not address the issue of
6 whether the [plaintiff] would still be disabled if she were
7 not actively abusing drugs and further inquiry would yield
8 no significant findings since the treating source has
9 indicated that the [plaintiff's] limitations are mild in
10 terms of memory and judgment when sober, that she has no
11 problems in terms of social withdrawal, and that she is
12 simply apathetic[,] which is consistent with the findings of
13 polysubstance dependence. This is also consistent with [Dr.
14 Rodriguez's] findings . . . and fully consistent with the
15 medical expert's findings at the hearing regarding the
16 severity of the [plaintiff's] mental impairment if she were
17 to stop abusing drugs.

18
19 A.R. 13. In other words, contrary to plaintiff's contention, the ALJ
20 did not ignore Dr. Bogost's opinion. Rather, the ALJ agreed with Dr.
21 Bogost's opinion to the extent it addressed plaintiff's ability to
22 work while she continued to abuse drugs, see Valentine, 574 F.3d at
23 691-92 (no error when ALJ considered physician's evidence claimant
24 contends ALJ ignored), and only "rejected" Dr. Bogost's opinion to the
25 extent it failed to consider the pertinent issue before the ALJ –
26 whether plaintiff would remain disabled if she stopped abusing drugs.

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28 175, 181, 201.

1 A.R. 13. To address that question, the ALJ relied on the two
 2 physicians who considered the issue - examining physician Dr.
 3 Rodriguez and medical expert Dr. Malancharuvil - and these physicians'
 4 findings constitute substantial evidence to support the ALJ's RFC
 5 assessment. See Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.
 6 2001) (examining physician's medical report based on independent
 7 examination of claimant constitutes substantial evidence to support
 8 ALJ's disability determination); Saelee v. Chater, 94 F.3d 520, 522
 9 (9th Cir. 1996) ("[T]he findings of a nontreating, nonexamining
 10 physician can amount to substantial evidence, so long as other
 11 evidence in the record supports those findings."), cert. denied, 519
 12 U.S. 1113 (1997). Thus, the ALJ did not err, and there is no merit to
 13 plaintiff's claim. Valentine, 574 F.3d at 691-92.

14

15 C. Dr. Rodriguez:

16 On February 10, 2007, when Dr. Rodriguez conducted a complete
 17 psychiatric examination of plaintiff, she was sober and not under the
 18 influence of drugs; however, Dr. Rodriguez determined plaintiff "is
 19 still actively using drugs illegally. . . ." A.R. 130. Based on his
 20 examination, Dr. Rodriguez determined plaintiff was: able to
 21 "understand, remember and carry out simple one or two-step
 22 instructions"; able "to do detailed and complex instructions";
 23 "[s]lightly limited" in her abilities to relate and interact with
 24 supervisors, coworkers and the public, to associate with day-to-day
 25 work activity, to adapt to the stresses common to a normal work
 26 environment, to maintain regular attendance in the work place and
 27 perform work activities on a consistent basis, and to perform work
 28 activities without special or additional supervision; and

1 "[m]oderately limited in her ability to maintain concentration and
 2 attention, persistence and pace." A.R. 133-34. Dr. Rodriguez also
 3 opined that if plaintiff "stopped using all illegal drugs and [was]
 4 properly treated . . . , she could easily recover from her problems
 5 within twelve months." A.R. 133.

6

7 The plaintiff contends that the ALJ failed to consider Dr.
 8 Rodriguez's opinion that plaintiff is "moderately" limited in her
 9 ability to "maintain concentration and attention, persistence and
 10 pace[,]" and, thus, failed to provide a "legally sufficient reason"
 11 for rejecting this finding. Jt. Stip. at 3:6-4:11. The plaintiff is
 12 mistaken. The ALJ did not "reject" any of Dr. Rodriguez's findings
 13 and, in fact, adopted Dr. Rodriguez's findings, specifically holding
 14 that "[w]ith regard to maintaining concentration, persistence or pace,
 15 the [plaintiff] would have marginally moderate difficulties if the
 16 substance use was stopped."¹⁰ A.R. 12. Thus, the ALJ did not err,
 17 and there is no merit to plaintiff's claim. Valentine, 574 F.3d at
 18 691-92.

19 //

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21

22 ¹⁰ Moreover, although Dr. Rodriguez opined plaintiff is
 23 "moderately" limited in her ability to maintain concentration,
 24 persistence and pace, he also found plaintiff's difficulties in
 25 this regard do not prevent her from being able to perform even
 26 detailed and complex instructions. A.R. 133. The ALJ's RFC
 27 assessment, which limited plaintiff to light "work involving
 28 . . . simple tasks, i.e., [no] more than four to five steps of
 instructions, [no] rapid, assembly-line-type work, [no]
 significant responsibility for the safety of others, [and no]
 significant hypervigilance[,]" A.R. 12, appropriately synthesized
 the limitations Dr. Rodriguez found.

1 **D. Plaintiff's Credibility:**

2 Once a claimant has presented objective evidence she suffers from
 3 an impairment that could cause pain or other nonexertional
 4 limitations,¹¹ the ALJ may not discredit the claimant's testimony
 5 "solely because the degree of pain alleged by the claimant is not
 6 supported by objective medical evidence." Bunnell v. Sullivan, 947
 7 F.2d 341, 347 (9th Cir. 1991) (en banc); Moisa v. Barnhart, 367 F.3d
 8 882, 885 (9th Cir. 2004). Thus, if the ALJ finds the claimant's
 9 subjective complaints are not credible, he "must provide specific,
 10 cogent reasons for the disbelief." Greger v. Barnhart, 464 F.3d 968,
 11 972 (9th Cir. 2006) (citations omitted); Orn v. Astrue, 495 F.3d 625,
 12 635 (9th Cir. 2007). Furthermore, if there is medical evidence
 13 establishing an objective basis for some degree of pain and related
 14 symptoms, and no evidence affirmatively suggesting the claimant is
 15 malingering, the ALJ's reasons for rejecting the claimant's testimony
 16 must be "clear and convincing." Morgan, 169 F.3d at 599; Carmickle v.
 17 Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1160 (9th Cir. 2008).

18
 19 The plaintiff contends the ALJ improperly discounted her
 20 credibility. There is no merit to this claim. Indeed, as the
 21 Commissioner argues, plaintiff's claim is a red herring. At the
 22 administrative hearing, plaintiff did not specifically testify about
 23 any mental limitations she experiences absent her substance abuse, but
 24 instead stated only that she cannot work due to "mental problems,"

25
 26 ¹¹ "While most cases discuss excess pain testimony rather
 27 than excess symptom testimony, rules developed to assure proper
 28 consideration of excess pain apply equally to other medically
 related symptoms." Swenson v. Sullivan, 876 F.2d 683, 687-88
 (9th Cir. 1989).

1 which led to a psychiatrist taking her "out of work" in 2006.¹² A.R.
 2 19. By mental problems, plaintiff explained that she meant her
 3 "ability to remember things" and "[t]o focus."¹³ A.R. 20. The ALJ,
 4 however, did not reject plaintiff's testimony. To the contrary, in
 5 finding plaintiff disabled when her substance abuse is considered, the
 6 ALJ found plaintiff "credible concerning her alleged symptoms and
 7 limitations because there is no credible evidence she has ever stopped
 8 using drugs[,]" A.R. 11, and this finding is supported by substantial
 9 evidence in the record demonstrating plaintiff continues to abuse
 10 drugs.¹⁴ See, e.g., A.R. 23-24, 38, 122-23, 162, 170, 195. There-
 11 fore, the ALJ did not improperly discredit plaintiff. Parra, 481 F.3d
 12 at 750-51.

13

14 **E. Duty To Develop The Record:**

15 "In Social Security cases, the ALJ has a special duty to fully
 16 and fairly develop the record and to assure that the claimant's
 17

18 ¹² The plaintiff did cursorily state drugs are not her main
 19 problem, and she has not been using any more, having last taken
 20 methamphetamine in September or October of 2007 and marijuana
 "not too long ago." A.R. 23-24, 38-39.

21 ¹³ The plaintiff also testified she had blackouts, she is
 22 anemic, and she has headaches, ringing in her ears, back
 23 problems, stomach problems, gallbladder problems and ulcers;
 24 however, she did not state these problems prevent her from
 working. A.R. 21-22, 41.

25 ¹⁴ The ALJ also found that plaintiff's "statements
 26 concerning the intensity, persistence and limiting effects of
 27 [her] symptoms are not credible to the extent they are consistent
 28 with the [RFC] assessment" because most of plaintiff's symptoms
 are "explainable by her drug abuse[,]" A.R. 13, and, as discussed
 throughout this opinion, plaintiff's drug abuse is not a basis
 for finding plaintiff disabled.

1 interests are considered.''" Smolen, 80 F.3d at 1288 (citation
 2 omitted); Widmark, 454 F.3d at 1068. This duty exists regardless of
 3 whether the claimant is represented by counsel, Celaya v. Halter, 332
 4 F.3d 1177, 1183 (9th Cir. 2003); Tonapetyan, 242 F.3d at 1150, and is
 5 "heightened where the claimant may be mentally ill and thus unable to
 6 protect her own interests." Tonapetyan, 242 F.3d at 1150. However,
 7 only "[a]mbiguous evidence, or the ALJ's own finding that the record
 8 is inadequate to allow for proper evaluation of the evidence, triggers
 9 the ALJ's duty to 'conduct an appropriate inquiry.'" Id. (citations
 10 omitted); Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005).

11

12 Here, the ALJ referred plaintiff for examinations by a
 13 psychiatrist, Dr. Rodriguez, and an orthopedic surgeon, William C.
 14 Boeck, Jr., M.D., A.R. 209-14, and also obtained a medical expert, Dr.
 15 Malancharuvil, who reviewed the medical evidence and listened to
 16 plaintiff's testimony before offering his opinions. A.R. 26-36. Yet,
 17 plaintiff contends the ALJ failed to develop the record because he did
 18 not seek further information from Dr. Bogost. It cannot be said,
 19 however, that there is any ambiguity in the evidence that would
 20 trigger the ALJ's duty to seek more information from Dr. Bogost. In
 21 fact, the ALJ specifically found no need for further inquiry. See
 22 A.R. 13 (Dr. Bogost "has indicated that the [plaintiff's] limitations
 23 are mild in terms of memory and judgment when sober, that she has no
 24 problems in terms of social withdrawal, and that she is simply
 25 apathetic . . ."). Since the ALJ had no problem interpreting Dr.
 26 Bogost's opinions, Mayes, 276 F.3d at 460, there is no merit to this
 27
 28

1 claim.¹⁵ For all these reasons, substantial evidence supported the
 2 ALJ's determination of plaintiff's RFC.

3
 4 **v**

5 At Step Five, the burden shifts to the Commissioner to show the
 6 claimant can perform other jobs that exist in the national economy.
 7 Hoopai v. Astrue, 499 F.3d 1071, 1074-75 (9th Cir. 2007); Widmark, 454
 8 F.3d at 1069. There are two ways for the Commissioner to meet this
 9 burden: "(1) by the testimony of a vocational expert, or (2) by
 10 reference to the Medical Vocational Guidelines ["Grids"] at 20 C.F.R.
 11 pt. 404, subpt. P, app. 2."¹⁶ Tackett v. Apfel, 180 F.3d 1094, 1099
 12 (9th Cir. 1999); Widmark, 454 F.3d at 1069. The Commissioner "must
 13 'identify specific jobs existing in substantial numbers in the
 14 national economy that [the] claimant can perform despite her
 15 identified limitations.'" Meanel v. Apfel, 172 F.3d 1111, 1114 (9th

16 ¹⁵ The plaintiff also claims the ALJ should have left the
 17 record open to allow her to supplement the record. Jt. Stip. at
 18 20:11-12. Yet, plaintiff was represented at the administrative
 19 hearing by counsel who did not request the record be left open
 20 for supplementation. See A.R. 42-43. Moreover, plaintiff does
 21 not assert she attempted to reopen the hearing, 20 C.F.R. §§
 22 404.944, 416.1444, or supplement the record after the hearing,
 23 and there is nothing in the record itself to suggest that she
 24 could not have done so.

25 ¹⁶ The Grids are guidelines setting forth "the types and
 26 number of jobs that exist in the national economy for different
 27 kinds of claimants. Each rule defines a vocational profile and
 28 determines whether sufficient work exists in the national
 29 economy. These rules represent the [Commissioner's]
 30 determination, arrived at by taking administrative notice of
 31 relevant information, that a given number of unskilled jobs exist
 32 in the national economy that can be performed by persons with
 33 each level of residual functional capacity." Chavez v. Dep't of
34 Health & Human Servs., 103 F.3d 849, 851 (9th Cir. 1996)
 35 (citations omitted).

1 Cir. 1999) (quoting Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir.
 2 1995)).

3

4 Here, a vocational expert, Alan L. Ey, testified at the
 5 administrative hearing. See A.R. 41-43. Hypothetical questions to a
 6 vocational expert must consider all of the claimant's limitations,
 7 Lewis v. Apfel, 236 F.3d 503, 517 (9th Cir. 2001), and "[t]he ALJ's
 8 depiction of the claimant's disability must be accurate, detailed, and
 9 supported by the medical record." Tackett, 180 F.3d at 1101. The
 10 plaintiff contends the hypothetical question to the vocational expert
 11 "fails to set out all of the plaintiff's particular limitations and
 12 restrictions" as identified by Drs. Bogost and Rodriguez. Jt. Stip.
 13 at 22:26-23:05. There is no merit to this claim.

14

15 The ALJ asked vocational expert Mr. Ey the following hypothetical
 16 question:

17

18 Let's suppose, Mr. [Ey], someone has a high school level
 19 education, not illiterate, limited to where they can only do
 20 simple tasks at work involving up to four or five-step
 21 instruction but no more than that, and no requirements for
 22 excessive speed in their physical activities like you'd have
 23 at a rapid assembly line, no responsibility for safety
 24 operations, no requirements for hypervigilance, no work
 25 around hazardous machinery and she'd be limited to light
 26 range of work. . . .

27

* * *

28 Are there any unskilled jobs that could [be] performed?

1 A.R. 41-42. In response, the vocational expert identified the jobs of
2 //
3 housekeeper (Dictionary of Occupational Titles ("DOT")¹⁷ no. 323.687-
4 014), with 21,000 job positions regionally and 302,000 nationally, and
5 mail clerk (DOT no. 209.687-026), with 4,000 job positions regionally
6 and 79,000 nationally. A.R. 42.

7
8 Since this hypothetical question reflects the limitations found
9 by Dr. Rodriguez and the ALJ's RFC determination of limited light
10 work, which this Court has found was proper, the vocational expert's
11 testimony constitutes substantial evidence to support the ALJ's Step
12 Five determination that plaintiff can perform other work in the
13 national economy and is not disabled. Stubbs-Danielson v. Astrue, 539
14 F.3d 1169, 1175-76 (9th Cir. 2008).

15
16 **ORDER**

17 IT IS ORDERED that: (1) plaintiff's request for relief is denied;
18 and (2) the Commissioner's decision is affirmed, and Judgment shall be
19 entered in favor of defendant.

20
21 DATE: November 23, 2009

22 /S/ ROSALENE M. CHAPMAN
ROSALENE M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

23
24
25
26 ¹⁷ The DOT is the Commissioner's primary source of reliable
27 vocational information. Johnson, 60 F.3d at 1434 n.6.